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Deconstructing ‘Public Interest’ in the Article 8 v 10 Balancing Exercise

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Misuse of private information (MPI) governs media privacy disputes in English law. The second stage of this doctrine involves a balancing exercise conducted between a claimant’s Article 8 privacy right and a defendant’s Article 10 right to free expression. Though the starting point is that both rights are of equal value, the balancing process entails an inevitable privileging of one right over the other (albeit tailored to the specific facts of each case). This article focuses on this privileging process and explores the principles that determine which right will prevail in any given case. It applies the analytical technique of deconstruction propounded by Derrida as employed by American critical lawyers. This technique involves identifying binary oppositions, ascertaining the dominant concept and reversing the given hierarchies to reveal their mutual dependence and any potential underlying subjectivities. Deconstructing MPI case law reveals that the balancing of Arts 8 & 10 is underpinned by a fundamental dichotomy, that of the ‘public interest versus interesting the public’. This underlying dichotomy is subjected to deconstructive analysis, revealing valuable insights into how these terms are deployed for rhetorical purposes by the various parties in MPI disputes, and the tensions between liberal ideals and commercial realities that permeate case law.

Deconstructing ‘Public Interest’ in the Article 8 v 10 Balancing Exercise

Lies, corruption, phone-hacking, routine privacy intrusion and other legally and/or ethically dubious practices; a number of recent parliamentary reports,¹ and the high-profile Leveson Report,² have revealed a heart of darkness within parts of the British print media exemplified by, but not restricted to, the Murdoch press. The political response to such failures has been the introduction of a new, more effective regime of press regulation,³ reforms that are currently in progress (and by no means uncontroversial). Meanwhile, the courts have been no less active; in addition to dealing with the ongoing criminal charges⁴ and group civil litigation⁵ generated by illegal phone-hacking activities, they have also repeatedly ordered restrictions on select press reportage that is deemed to unjustifiably invade individual privacy. This latter judicial activity is a result of the passage of the Human Rights Act 1998, which incorporated the ECHR rights of privacy (Art 8) and free expression (Art 10) into English law. A doctrine termed misuse of private information (MPI), forged by judges from a fusion of common law breach of confidence and European Court of Human Rights (ECtHR) jurisprudence, has subsequently emerged.⁶

Misuse of private information disputes raise profound questions about the nature of press freedom, the innate value of tabloid expression and the wider implications of its associated celebrity culture. This article analyses how the courts have dealt with such issues by undertaking analysis of the interaction between the rights of privacy and free expression in MPI caselaw, with particular focus on ‘public interest’, the central judicial concept that influences it. MPI doctrine involves a two-stage test, the first limb of which requires the court to determine whether the relevant claimant, usually a high-profile individual, had a ‘reasonable expectation of privacy’.⁷ If so, the court undertakes a second stage test which involves balancing the claimant’s Art 8 right against the defendant’s Art 10 right

¹ House of Commons Select Committee for Culture, Media and Sport, *News International & Phone Hacking*, HC 903-I (2010-2012); House of Lords and House of Commons Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, HC 1443 (2010-2012); House of Commons Select Committee for Culture, Media and Sport, *Press Standards, Privacy & Libel*, HC 362-I (2008-2009).

² Lord Justice Leveson, ‘An Inquiry into the Culture, Practices and the Ethics of the Press, Report’ (HC 780-I to HC 780-IV, November 2012).

³ Final Draft of Royal Charter on Self-Regulation of the Press (30th October 2013), via <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249783/Final_Draft_Royal_Charter_11_Oct_2013.pdf> (accessed 28 March 2014).

⁴ See eg *R v Coulson & Others* [2013] EWCA Crim 1026. Seven former employees of the News of the World newspaper were subject to criminal charges. The verdicts for former editors Rebekah Brooks and Andy Coulson were reached on 24th June 2014.

⁵ See eg: *R (on the application of Bryant & Others) v Commissioner of Police of the Metropolis* [2011] EWHC 1314; *Phillips v News Group Newspapers Ltd* [2012] UKSC 28; *Various Claimants v Newsgroup Newspapers* [2013] EWHC 2119; *Gulati & Others v MGN Ltd* [2013] EWHC 3392.

⁶ This is a process I have charted elsewhere: Rebecca Moosavian, ‘Charting the Journey from Confidence to the New Methodology’ *European Intellectual Property Review* 2012 34(5) 324-335.

⁷ *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.

based upon the specific facts of the individual case.⁸ The focus of this article is this second stage balancing exercise. In undertaking analysis of the balancing exercise, this article draws upon deconstructive theory. It provides a brief overview of deconstruction before outlining the legislative framework governing the privacy/free expression ‘conflict’. It then undertakes detailed examination of a crucial maxim recurring across MPI caselaw, namely ‘what interests the public is not necessarily in the public interest’. This article provides an analysis of the judicial distinction between expression in the ‘public interest’ and that which ‘interests the public’, employing deconstructive techniques to reveal the subterranean tensions that beset this convenient, pithy, yet influential maxim.

[1] Deconstruction & law

Deconstruction is a technique for reading and interpreting a given text, be it literary, philosophical or legal. Deconstruction does not put forward an overarching theory, political vision or grand narrative,⁹ but instead provides a strategy to explore language in texts and scrutinise the logic with which it is used, highlighting any innate contradiction, paradox and conflict.¹⁰ In this sense it is a technique that involves questioning the objective truth claims of various discourses and, arguably, the complacency and lack of self-examination such claims may engender. Deconstruction thus involves a suspicion of the definite and, in a political context, an awareness of the contingency and fragility of the concepts upon which many of liberalism’s central institutions, including law, are based.

‘[T]he ‘translation’ of Derrida into law remains a contentious issue’¹¹ and literature in the field is rich and varied.¹² This article primarily draws upon American literature in deconstruction and law, particularly that associated with critical legal studies (cls),¹³ a tradition concerned with left-leaning

⁸ *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

⁹ “Deconstruction appeals to no higher logical principle or superior reason but [instead] uses the very principle it deconstructs.” Jonathan Culler, *On Deconstruction*, 25th Anniversary Edition (London: Routledge, 2008) 87. See also, Jonathan Culler, *Framing the Sign, Criticism and its Institutions* (Oxford: Basil Blackwell, 1988) 140.

¹⁰ A. C. Hutchinson, ‘From Cultural Construction to Historical Deconstruction’ (book review), (1985) 94 *Yale Law Journal* 209, 230.

¹¹ Jacques de Ville, ‘Deconstruction and Law: Derrida, Levinas and Cornell’, (2007) Vol 25(1), *Windsor Yearbook of Access to Justice* 31, 32.

¹² A full account of wider literature in deconstruction and law is beyond the scope of this article, but see eg: Drucilla Cornell, *The Philosophy of Limit* (London: Routledge, 1992); Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (London: Routledge, 1992); Jacques de Ville, ‘Revisiting Plato’s Pharmacy’ (2010) 23 *International Journal for the Semiotics of Law* 315-335.

¹³ See eg Mark Tushnet, ‘Critical Legal Studies and Constitutional Law: An Essay in Deconstruction’, 36 *Stanford Law Review* 623 1984; Duncan Kennedy, ‘European Introduction: Four Objections’ in Peter Goodrich, Florian Hoffmann, Michel Rosenfeld, Cornelia Vismann (eds) *Derrida and Legal Philosophy* (Hampshire: Palgrave Macmillan, 2008); Duncan Kennedy, ‘A Semiotics of Legal Argument’ (1991) 42

critique of mainstream liberal legal doctrine. General features common across cls literature include a concern to highlight the fundamentally political character of law, particularly its role in buttressing social and economic inequalities, paying particular attention to the innate contradictions and indeterminacies that permeate law, as well as its historically and culturally specific nature.¹⁴ The literature outlined in this part interprets and applies deconstructive ideas to specific legal doctrine, as exemplified by Balkin's work in this area.¹⁵ Such approaches have been criticised for conveniently co-opting deconstruction into legal discourse by attempting to 'formalize and domesticate'¹⁶ it to serve as 'just another technique, just another theory, just another method for making arguments';¹⁷ this, for some commentators, is contrary to the fundamentals of the theory¹⁸ and strips deconstruction of its radical political force.¹⁹ Nevertheless Balkin convincingly defends the 'methodological' deconstruction employed by lawyers, maintaining that it serves the needs of legal scholarship more effectively.²⁰ The relevant US literature outlined here makes what could otherwise be a somewhat marginal, esoteric theory relevant to legal discourse. It effectively highlights the pertinence of this language-based critique to law, a language-based discipline, in a form intuitively comprehensible to lawyers. Thus, rather than adopting a 'pure' deconstructive strategy per se, the approach in this article may be viewed as deconstruction-influenced doctrinal analysis in the critical legal studies ('cls') tradition. This part provides a summary of cls-style deconstruction in law as a basis for later critique.

Deconstructive readings of texts attempt to draw out the limitations of language, to indicate that a text may not represent all that it appears to, or there may be dynamics operating within a text that are at odds with what it prima facie seems to state. For example, there may be subtle but crucial shifts in

Syracuse Law Review 75; Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1349.

¹⁴ See eg, Mark Kelman, *A Guide to Critical Legal Studies* (Massachusetts: Harvard University Press, 1987), especially 1-14; Duncan Kennedy & Karl Klare, 'A Bibliography of Critical Legal Studies', 94 (1984) *Yale Law Journal* 461, 461-462; M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 8th edn (London: Sweet & Maxwell, 2008), ch 14.

¹⁵ J. M. Balkin, 'Deconstructive Practice and Legal Theory', 96 (1987) 96 *Yale Law Journal* 743. Culler also provides an excellent and lucid account in *On Deconstruction* (n 9).

¹⁶ Pierre Schlag, 'The Politics of Form and the Domestication of Deconstruction' (1990) 11 *Cardozo Law Review* 1631, 1642.

¹⁷ *ibid* 1636

¹⁸ For Schlag, this is inconsistent with deconstruction, because it leaves intact certain assumptions that deconstruction seeks to subvert, namely the privileged, autonomous individual self and linguistic form as a neutral vehicle. *ibid*.

¹⁹ *Ibid*. See also: Pierre Schlag, 'A Brief Survey of Deconstruction' (2005) 27 *Cardozo Law Review* 741. See also, more generally, De Ville (n 9).

²⁰ J. M. Balkin, 'Deconstruction's Legal Career' (2005) 27 *Cardozo Law Review* 719. Here Balkin states 'targeted and focused uses of deconstruction were more successful precisely because deconstruction works in the interstices of specific texts and specific problems, involving contextual judgments rather than grand generalizations' at 736. See also J. M. Balkin, 'Nested Oppositions' (Book Review) (1990) 99 *Yale Law Journal* 1669, 1671.

the meanings that underlie certain words (or ‘signs’) used.²¹ Or it may be revealed that a text implicitly relies on hidden rhetorical devices.²² Initially it may seem that a deconstructive approach conflicts with mainstream lawyerly understandings of language which arguably strive to achieve clarity and certainty by ultimately fixing a single definitive interpretation in any given case.²³ Yet, for Derrida, law is eminently deconstructible because ‘it is founded, constructed on interpretable and transformable textual strata’.²⁴ Thus in a legal context, deconstruction will aim to identify blind spots, hidden rhetoric and multiple meaning within texts; it will lead one to question accepted, mainstream liberal legal concepts by highlighting their unstable, contingent nature.

The aspect of deconstruction perhaps most relevant to law is its identification and analysis of ‘binary oppositions’.²⁵ These are pairs of concepts which represent opposites and are thus situated in an apparently conflicting relationship with one another, for example: man/woman, West/East, light/dark.²⁶ Such binary terms are widely accepted as simply reflecting objective reality, or ‘how things are’, but deconstruction views them as human constructs. In law binary oppositions frequently take the form of a ‘dichotomy’,²⁷ and as such they play a fundamental role in legal doctrine as well as other disciplines. For example, Dalton’s deconstructive analysis of American contract law analyses three binary oppositions that underpin caselaw, namely the divides between private/public, objective/subjective and form/substance.²⁸ Dalton claims that such oppositions may be reproduced at different levels of abstraction.²⁹

According to deconstruction, one of the terms in the binary opposition will be innately privileged:

‘In a traditional philosophical opposition we have not a peaceful co-existence of facing terms but a violent hierarchy. One of the terms dominates the other ... , occupies the commanding position’³⁰

²¹ See, for example, ‘Plato’s Pharmacy’ in Jacques Derrida, *Dissemination* (Chicago: University of Chicago, 1981).

²² See, for example, Derrida’s discussion of animal imagery in Hobbes’ *Leviathan* in *The Beast & the Sovereign*, Volume I (London: University of Chicago Press, 2009), first session, second session.

²³ According to Derrida this outlook pervades Western thought generally. Barbara Johnson, ‘Introduction’ in Derrida, (n 21) ix.

²⁴ Jacques Derrida, ‘Force of Law: The “Mystical Foundation of Authority”’, (1990) 11 *Cardozo Law Review* 920, 943.

²⁵ Derrida, (n 21) 4. See also Balkin, *Nested Oppositions* (n 20).

²⁶ ‘The dual opposition (remedy/poison, good/evil, intelligible/sensible, high/low, mind/matter, life/death, inside/outside, speech/writing, etc.)’. Derrida (n 21) 24-25.

²⁷ For example, the idea/expression dichotomy in copyright law; *Kenrick v Lawrence* [1890] 25 QB 99. Or the subjective/objective divide that cuts across many areas of criminal law. On distinctions within law more generally, see Pierre Schlag, ‘Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction’ (1988) 40 *Stanford Law Review* 929.

²⁸ Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine’, (1985) 94 *Yale Law Journal* 997.

²⁹ *ibid*, 1003, 1050, 1063. See also Balkin, *Nested Oppositions*, (n 20) 1684.

³⁰ Derrida quoted by Culler in *On Deconstruction* (n 9) 85. See also Derrida (n 21) 5, 24-25.

This has potential application in a legal context because legal concepts also arguably rely on an unspoken privileging. For example, using Dalton's examples, contract law repeatedly privileges private over public, objective over subjective and form over substance.³¹ Thus, viewed in deconstructive terms, law does not necessarily achieve convenient, tidy doctrinal unity, but merely implicitly prioritises certain concepts or visions over others.³² The suppressed concept in the binary opposition is termed a 'dangerous supplement'.³³ Despite its marginalisation, it is in fact necessary because the dominant concept is incomplete or lacking in some way and thus must be supplemented.³⁴ In this sense the dominant term is reliant upon the subservient and there is an element of interchangability between these apparent opposites.

Once a binary opposition has been identified, deconstruction involves a temporary reversal of the accepted hierarchy so that the dominant concept becomes the subjugated.³⁵ But such a displacement is not concerned with establishing a new hierarchy;³⁶ this would simply reverse the previous dynamic, exposing itself to the same criticisms.³⁷ Thus deconstructive reversal of the opposition is only temporary – a transient intellectual exercise. But this too is valuable because:

'Analysis of the functioning of such oppositions ... involves an interest in what's at stake in these hierarchizations and an attempt to undo it, showing that the system does not live up to its proclaimed principles.'³⁸

This interest in reversal, even if only temporary, highlights deconstruction's natural affinity with the marginalised (or its 'alliance with the underdog'³⁹) and can be utilised to create opportunities for the voice of 'the other'.⁴⁰

³¹ (n 28) 1000, 1040.

³² As Rosenfeld states: 'A writing may give the impression of having achieved the desired reconciliation, but such impression can only be the product of ideological distortion, suppression of difference or subordination of the other.' Michel Rosenfeld, 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of New Legal Formalism' in Cornell, Rosenfeld and Carlson (n 12) 153.

³³ 'Why is the surrogate or supplement dangerous? It is not, so to speak, dangerous in itself ... As soon as the supplementary outside is opened, its structure implies that the supplement itself can be ... replaced by its double, and that a supplement to the supplement, a surrogate for the surrogate, is possible and necessary'. Derrida (n 21) 109.

³⁴ For example, Derrida views speech as innately privileged over writing in Western philosophy, but also envisages writing as a supplement of speech; *ibid*, 109-110.

³⁵ '[D]econstruction involves an indispensable phase of reversal.' *ibid* 6.

³⁶ Balkin (n 15) 770, 786.

³⁷ David Jabbari, 'From Criticism to Construction in Modern Critical Legal Theory' (1992) 12 *Oxford Journal of Legal Studies* 507, 510-511.

³⁸ Culler, *Framing the Sign* (n 9) 145.

³⁹ Drucilla Cornell, Michel Rosenfeld and David Gray Carlson 'Introduction' in (n 32) ix.

The deconstructive process of reversal highlights the mutual reliance of each concept in the opposition. One can only be defined in terms of, or with reference to, the other. Each concept leaves its trace upon the other. In Balkin's terms, 'When we hold an idea in our minds, we hold both the idea and its opposite'.⁴¹ So concepts may prove to be self-subverting, containing contradictory aspects or meanings, and these form part of the very structure of discourse. The conflict between both concepts, as commonly understood, is thus revealed as an illusion.⁴² What results is what Derrida terms 'A Crisis of versus: these marks can no longer be summed up or "decided" according to the two ... binary oppositions'.⁴³ This mutual reliance, which Derrida terms 'différance',⁴⁴ means that there cannot be a pure, clear distinction between opposing concepts. For example, Frug deconstructively analyses four models that justify bureaucracy in US law. Despite the models' apparent claims to maintain a clear divide between objective and subjective, Frug identifies the concealed interplay of these conflicting elements within each model, arguing that 'Every attempt to separate objective and subjective in bureaucratic thought has instead resulted in relentless intermixing of them'.⁴⁵ The dichotomy is thus flawed; objective and subjective are each a 'dangerous supplement of the other'⁴⁶ and 'we can never draw a line between them'.⁴⁷ Adopting a similar strategy, Dalton explores the circularity of US contract doctrine,⁴⁸ revealing weak foundations and conceptual inadequacies.⁴⁹ Dalton argues that mainstream accounts of US contract law fail to acknowledge fully the interdependence of public and private, stating that 'Once these interrelationships are understood ... the public private dichotomy threatens to dissolve'.⁵⁰ Ultimately, deconstructing oppositions has the effect of destabilising meaning and breaking down clear-cut distinctions between concepts. In this sense the given hierarchy is revealed as contingent and ultimately informed by ideological or other values rather than reflecting some natural, universal order.

Deconstruction has the potential to afford illuminating and unconventional insights into the balancing exercise because it is constructed around an apparent opposition between privacy and free expression.

⁴⁰ Deconstruction has generally been adopted as a technique by commentators with a social vision, most notably: feminists, see eg Joan Williams, 'Gender Wars: Selfless Women in the Republic of Choice' (1991) 66 *New York University Law Review* 1559; and critical legal scholars, see eg (n 13).

⁴¹ Balkin (n 15) 753. See also, Balkin, *Nested Oppositions* (n 20).

⁴² Johnson (n 23) ix – x.

⁴³ Derrida (n 21) 25.

⁴⁴ Derrida describes *différance* as 'a "productive", conflictual movement ... which disorganizes "historically", "practically", textually, the opposition or the difference (the static distinction) between opposing terms.' *ibid* 6-7. Elsewhere he states: 'Différance ... which brings the radical otherness or the absolute exteriority of the outside into relation with the closed, agonistic, hierarchical field of philosophical oppositions'. *ibid* 5.

⁴⁵ Gerald Frug, 'The Ideology of Bureaucracy in American Law' (1984) 97 *Harvard Law Review* 1276, 1289.

⁴⁶ *ibid* 1288.

⁴⁷ *ibid* 1291; 1331.

⁴⁸ (n 28) 1066.

⁴⁹ *ibid* 1023-1024

⁵⁰ *ibid* 1024.

But such techniques also reveal dichotomies present at underlying levels of abstraction in legal doctrine; this article's deconstructive reading of MPI caselaw exposes a more general (but nonetheless influential) dichotomy between expression in the public interest and expression which 'merely' interests the public. Applying deconstructive strategies draws out the underlying assumptions that influence these dichotomies and may lead us to question whether the balancing process is as caselaw presents, and whether this jurisprudence is as coherent and orderly as it appears. A natural starting point for such inquiry is Articles 8 and 10.

[2] The framework: Article 8 'versus' 10

The crucial balancing stage in MPI doctrine involves a clear binary opposition-like conflict between privacy and free expression.⁵¹ Indeed there is widespread judicial acknowledgement that Arts 8 and 10 are in competition with one another,⁵² though their mutual reliance has also been occasionally noted.⁵³ MPI judgments also repeatedly state that Arts 8 and 10 are of equal value, expressly excluding the proposition that one is innately privileged: 'neither article has as such precedence over the other'.⁵⁴ Thus MPI caselaw expressly rules out the sort of hierarchizing that has been the focus of deconstructive strategies in other discourses. Initially this may appear to limit the relevance and potential of deconstruction to this body of caselaw. Yet the axiom that Arts 8 and 10 are equal is only a starting point. The practical realities of litigation require the courts to rule in one side's favour; thus the balancing process inevitably requires either privacy or free expression to be privileged over its opponent in a zero-sum fashion (albeit tailored to the specific facts of each individual case and category of information). This prioritisation is facilitated by the construction of the respective Articles, each of which sets out the relevant right⁵⁵ followed by a series of limitations that enable it to

⁵¹ Wragg repeatedly refers to the 'privacy/free speech dichotomy' in 'A Freedom to Criticise? Evaluating the Public Interest in Celebrity Gossip after Mosley and Terry' (2010) 2(2) *Journal of Media Law* 295-320.

⁵² *Campbell v MGN Ltd* [2004] UKHL 22, [12]; *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776, [45], [73]; *A v B (Flitcroft)* [2002] EWCA Civ 337, [12]; *LNS v Persons Unknown (Terry)* [2010] EWHC 119, [61]; *Axel Springer AG v Germany* [2012] ECHR 39954/08, [84], and dissenting opinion of Judge Lopez Guerra.

⁵³ *Campbell* (n 52) [55] (Lord Hoffmann); *Terry* (n 52) [98]. See also: Charles Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475, 483-484; F. La Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (April 2013) UN Doc.A/HRC/23/40. [24], [79].

⁵⁴ *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [17] (Lord Steyn). See also: *Campbell* (n 52) [113] (Lord Hope). See also Resolution 1165 (1998) Council of Europe Parliamentary Assembly as cited in: *Flitcroft* (n 52) [6]; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 [126]; *Axel Springer* (n 52) [50]; *Von Hannover v Germany (No 2)* [2012] ECHR 40660/08, [71].

⁵⁵ Article 8(1), Article 10(1) European Convention Human Rights and Fundamental Freedoms 1950.

be restricted in a broad range of circumstances.⁵⁶ This structure affords potential scope for the privacy right to be limited where freedom of expression is at stake, and vice versa.

Judicial recognition of this mirroring is present in leading cases⁵⁷ and is epitomised by the following statement in Theakston: ‘The language of Article 8(2) and Article 10(2) each bring in the competing rights contained within the other article.’⁵⁸ Even the proportionality test is framed in mutually-reflecting terms in that ‘the proportionality of interfering with one [right] has to be balanced against the proportionality of restricting the other’.⁵⁹ So throughout MPI caselaw privacy and free expression are envisaged as sharing the same fundamental structure, each neatly replicating its opponent in an apparently self-contained yin-yang dichotomy. ‘Articles 8 and 10 enjoy a reciprocal structural symmetry; each contains potential allowance for the other’.⁶⁰ Crucially, the privileging in this privacy/free expression binary opposition is reversible, and this relationship is thus ripe for analysis in deconstructive terms.

Frug’s findings that key terms in US bureaucratic law tests contain contradictory notions and thus merge both opposing sides of a given issue⁶¹ are equally applicable to Articles 8 & 10. According to Frug, this ‘dual nature ... generates the two-sided character of legal argument, as well as its ultimate indeterminacy. ... Contradictory legal arguments can thus be generated by emphasizing one facet [within a term or test] at the expense of the other.’⁶² This account also typifies the nature of opposing legal argument in the balancing stage of MPI cases where the subjugation of either privacy or free expression is viewed as within the terms of, and indeed consistent with, that very right. Thus the right is not just dominated by its opponent, but also conveniently self-subverting.⁶³

The Art 8/10 framework per se reveals little about the privileging of either right or the broader values that influence it. Free expression, in Fish’s terms, ‘is not an independent value’, has no ‘‘natural content’’, but constitutes a ‘political prize’ for partisan struggle.⁶⁴ For Fish,

⁵⁶ Article 8(2), Article 10(2) European Convention Human Rights and Fundamental Freedoms 1950.

⁵⁷ The Law Lords in *Campbell* agreed that each right has the same structure; *Campbell* (n 52) [105], [139] [140].

⁵⁸ *Theakston v MGN Ltd* [2002] EWHC 137, [67]. See also: *Douglas and others v Hello! Ltd* [2001] QB 967 (CA), [133] (Sedley LJ); *Campbell* (n 52) [111] (Lord Hope)

⁵⁹ *Campbell* (n 52) [140] (Baroness Hale); *Re S* (n 54) [17] (Lord Steyn).

⁶⁰ (n 6) 331.

⁶¹ (n 45) 1300-1305.

⁶² Wording added. *ibid* 1304.

⁶³ For example, Tugendhat and Christie indicate that the balancing exercise is to be conducted within Art 10: ‘Historically, the European Court has made it clear that any “balancing exercise” that has to be carried out between the right to freedom of expression and the grounds for interfering with it under Article 10(2)...’ Tugendhat & Christie, *The Law of Privacy and the Media* (Oxford: Oxford, 2nd ed, 2011) 12.144.

⁶⁴ Stanley Fish, ‘There’s No Such Thing as Free Speech and It’s a Good Thing Too’ (Feb 1992) *Boston Review*, 3-26, 3, 26. See also: Stanley Fish, ‘Fraught with Death: Skepticism, Progressivism, and the First Amendment’ (1993) 64 *University of Colorado Law Review* 1061, 1062.

‘When the First Amendment [right to free speech] is successfully invoked the result is not a victory for free speech in the face of a challenge from politics, but a political victory won by the party that has managed to wrap its agenda in the mantle of free speech.’⁶⁵

Arts 8 & 10, each formulated in manipulable abstract terms, can thus be viewed as generalised statements of political ideals that do not have fixed meanings per se. They require political or social argument to be constructed around the privacy/free expression dualism in the form of rights versus rights conflicts, but do not provide specific guidance about how such conflicts should be dealt with. Instead, Articles 8 & 10 immediately defer potential conflict by delegating the interpretation of meaning in any specific context to the judiciary. Indeed it is only through synthesis with such factual context that the Articles’ very meanings are produced.⁶⁶ This ultimately highlights the perceptiveness of Griffith’s observation that the text of Article 10 ‘sounds like the statement of a political conflict pretending to be a resolution of it.’⁶⁷

Ultimately, the inevitable privileging of either privacy or free expression in MPI must be guided by more abstract-level principles employed by judges. Deconstructive analysis must therefore be undertaken at this level by investigating the emerging body of principles that determine which of the two rights will prevail in any given case. The balancing of Article 8 against Article 10 is guided by Lord Steyn’s four key principles⁶⁸ and, more recently, general criteria set out by the ECtHR⁶⁹ including: the claimant’s renown and prior conduct, the subject of the report and the content, form and consequences of the publication.⁷⁰ But, in essence, the MPI rights-balancing is understood in terms of whether the public interest in the defendant’s proposed expression outweighs the claimant’s privacy right.⁷¹ Where a media defendant’s proposed publication serves the ‘public interest’, then the Art 10 right will dominate or ‘outweigh’ Art 8. Yet where the publication does not serve the public interest, instead ‘merely’ interesting the public, then Art 8 will be privileged. So the ‘public interest’ is the fundamental animating concept and major underlying determinant of the Art 8/10 privileging process. It is to this dichotomy that discussion now turns.

⁶⁵ Fish, *No Such Thing as Free Speech* (n 64) 25.

⁶⁶ One aspect of deconstructive investigation is focus upon how context alters the functioning of language: Culler, *On Deconstruction* (n 9); Culler, *Framing the Sign* (n 9) 147-8; Balkin (n 15) 780.

⁶⁷ Emphasis added. J A G Griffith, ‘The Political Constitution’ (1979) 42 *Modern Law Review* 1-21, 14.

⁶⁸ *Re S* (n 54) [17]. Lord Steyn’s principles were drawn from *Campbell* (n 52).

⁶⁹ *Axel Springer* (n 52) [89]-[95]; *Von Hannover* (No 2) (n 54) [108]-[113]. See also: *Von Hannover v Germany* (No 3) [2013] App 8772/10.

⁷⁰ *Axel Springer* (n 52) [90]-[95]; *Von Hannover* (No 2) (n 54) [108]-[113]. Other factors set out in English cases have included: whether there was a contractual duty of confidence between the parties (*Prince of Wales* (n 52) [31], [66]-[67]); the claimant’s own personality or robustness (*Terry* (n 52) [127]); the Art 8 rights of other family members where evidenced (*CDE v MGN* [2010] EWHC 3308, [6]-[7]; *ETK* (n 8) [17]-[18], [19]).

⁷¹ *Browne v Associated News* [2007] EWCA Civ 295, [38]. See also: *Mosley* (n 53) [14].

[3] The underlying dichotomy: public interest ‘versus’ interesting the public

In the context of MPI doctrine public interest is conceived as a binary opposition, encapsulated in the maxim ‘what interests the public is not necessarily in the public interest’.⁷² This ‘argument-bite’⁷³ is recited in numerous major cases⁷⁴ and is viewed as a ‘key distinction’ in the area.⁷⁵ The Leveson Report stated that ‘the fundamental difference between the public interest and what interests the public’ is a ‘well-worn’ point.⁷⁶ At balancing stage the courts engage in a qualitative assessment of the defendant’s proposed expression, categorising stories (or fragments of them) as falling within one of two categories; either serving a general public interest or merely interesting the public. Expression in the public interest is afforded greater weight in the Art 8/10 balancing process and is thus privileged over and above its ‘interesting to the public’ counterpart. Yet this binary opposition, ostensibly between socially significant speech and trivial gossip, warrants further deconstructive scrutiny. This part draws out mainstream judicial and academic depictions of both components of the dualism in turn, as a basis for subjecting them to deconstructive critique. Part 4 then examines the reasoning employed in caselaw and asks: Are there any respects in which the preferred concept of ‘public interest’ is reliant on the ‘interesting to public’ category it subjugates? Are the categories as distinct and opposed they are presented?

3.1 ‘Public interest’

The presence of public interest-based elements in the balancing exercise is a cumulative result of its origins in breach of confidence,⁷⁷ the influence of the Press Complaints Commission Code⁷⁸ and also

⁷² This maxim appears to have first been coined by Lord Wilberforce in *British Steel Corporation v Granada Television Limited*: “there is a wide difference between what is interesting to the public and what it is in the public interest to make known”. [1981] AC 1096, 1168G. This was later quoted by Stephenson LJ in *Lion Laboratories Limited v Evans* [1985] 1 QB 526 (CA), 537B.

⁷³ Kennedy, *Semiotics of Legal Argument* (n 13) 75-76, 80.

⁷⁴ *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, [66]; *Prince of Wales* (n 52) [51]; *Mosley* (n 54) [114]; *ETK* (n 8) [23]; *Mosley v UK* (App. 480009/08) May 2011, ECtHR, [114]. See also: *Privacy and Injunctions* (n 1) 5.

⁷⁵ *Tugendhat & Christie* (n 63) 12.95.

⁷⁶ *Leveson Report* (n 2) Pt B, Ch 4, [4.9]. The distinction may be ‘well-worn’ but it has not been subjected to detailed scrutiny.

⁷⁷ *Lion Laboratories* (n 72); *A-G v Observer Ltd and others (Spycatcher)* [1990] 1 AC 109.

⁷⁸ The PCC Code states that ‘1. The public interest includes, but is not confined to: i) Detecting or exposing crime or serious impropriety; ii) Protecting public health and safety; iii) Preventing the public from being

s.12 HRA.⁷⁹ The development of MPI caselaw has seen the emergence of three overlapping limbs of public interest-based justification.⁸⁰ Each limb broadly corresponds to particular, though interlinked, theoretical justifications for free expression, though these are not explicitly discussed in judgments.

Contribution to democratic debate

The first ground is that publication of information will be in the public interest where it contributes to a debate of general interest. This is viewed as the prevailing rationale employed by the ECtHR,⁸¹ and the most influential modern justification for free expression generally.⁸² It is rooted in the proposition that free expression is instrumentally essential to foster democratic debate and participation.⁸³

Its influence is present in *Campbell* where Baroness Hale prioritised political speech due to its important role in a democracy, followed by intellectual, educational and artistic speech. But, in contrast, ‘the political and social life of the community, and the ... personal development of individuals, are not obviously assisted by pouring [sic] over the intimate details of a fashion model’s private life’.⁸⁴ The ECtHR has indicated that the publication’s contribution to a debate of general interest is ‘the decisive factor’⁸⁵ and an ‘essential criterion’⁸⁶ in Art 8/10 disputes. In *Von Hannover* it drew a ‘fundamental distinction’ between the reportage of facts which contribute to debate in a democratic society (eg about politicians performing their public role) and, on the other hand,

misled by an action or statement of an individual or organisation. 2. There is a public interest in freedom of expression itself.’ Accessible via <http://www.pcc.org.uk/assets/696/Code_of_Practice_2012_A4.pdf> (accessed 28 March 2014). This must be considered by the court under HRA 1998, s 12(4)(b). Note that the PCC is to be disbanded in due course.

⁷⁹ HRA 1998, s 12(4)(a)(ii) requires courts to consider the public interest when deciding whether to grant interim injunctions.

⁸⁰ Though note Wragg’s three alternative public interest categories: (1) preventing the public from being misled; (2) public figures as role models; (3) freedom of the media to criticise others. Paul Wragg, ‘The Benefits of Privacy-Invasive Expression’ [2013] Northern Ireland Legal Quarterly 64(2), 187-208, 195.

⁸¹ Gavin Phillipson and Helen Fenwick, ‘Breach of Confidence as a Privacy Remedy in the Human Rights Act Era’ (2000) 63(4) *Modern Law Review* 660-693, 683; Paul Wragg, ‘Mill’s Dead Dogma: the Value of Truth to Free Speech Jurisprudence’ [2013] *Public Law* 363-385, 381-2.

⁸² Leveson Report (n 2) Pt B, Ch 2, [3.1], [2.17], [3.7], [4.1]-[4.2]. See also: Eric Barendt, *Freedom of Speech*, 2nd edn (Oxford: Oxford, 2007) 18. Though it has recently been subject to question in *Miranda v Secretary of State for the Home Department & The Commissioner of the Police of the Metropolis* [2014] EWHC 255, [45]-[46] (Laws LJ).

⁸³ Robert Bork, ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Journal* 1; Alexander Meiklejohn, ‘The First Amendment is an Absolute’, (1961) *Supreme Court Review* 245.

⁸⁴ *Campbell* (n 52) [148]-[149] (Baroness Hale); [117] (Lord Hope). See also, Baroness Hale quoted in *Donald v Ntuli* [2010] EWCA Civ 1276, [21].

⁸⁵ Emphasis added. *Von Hannover v Germany* (No 1) [2004] EMLR 21 ECtHR, [76]; [60]. Contribution to a debate of general interest was also seen as a ‘decisive factor’ in *Ferdinand v MGN Ltd* [2011] EWHC 2454, [62]; *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24, [30]-[31]; ETK (n 8) [23].

⁸⁶ *Axel Springer* (n 52) [90]; *Von Hannover* (No 2) (n 54) [109]. See also: *Krone Verlag GmbH v Austria* [2012] ECHR 33497/07 [48]-[49].

reportage concerning the private lives of individuals who have no official functions.⁸⁷ The ECtHR has reiterated this ‘fundamental distinction’ in subsequent judgments,⁸⁸ and it similarly influences domestic caselaw. For example, in *ETK Ward LJ* stated that a proposed News of the World story about the claimant’s extra-marital affair did not contribute to a debate of general interest⁸⁹ because there was

‘No political edge to publication. The organisation of the economic, social and political life of the country so crucial to democracy is not enhanced by publication. The intellectual, artistic or personal development of members of society is not stunted by ignorance of sexual frolics of [public figures].’⁹⁰

However, defendants have successfully used this argument in a number of cases. In *Abbey v Gilligan* information that raised questions about the possible blurring of Lord Coe’s private commercial interests and public duties prior to the London Olympics was held to contribute to a debate of public importance.⁹¹ In *Goodwin* the court allowed publication of the job description of a senior female RBS employee who had an affair with Sir Fred Goodwin, its Chief Executive, because this story was relevant to the issue of standards in public life.⁹² The findings in *Gilligan* and *Goodwin* epitomise the core democratic debate justification. Bork, a proponent of this argument, claims that democracy is reliant upon ‘open and vigorous debate about officials and their policies’, and thus expression dealing ‘explicitly, specifically and directly with politics and government’ must be viewed as more important than other speech or activities which merely involve gratification of subjective human tastes or preferences.⁹³

But the ECtHR has confirmed that the democratic debate ground is not confined to political speech in a narrow sense.⁹⁴ One basis for a broader understanding of ‘democratic debate’ is Meiklejohn’s wider interpretation. Like Bork, he justifies free expression on the basis of its instrumental necessity to citizens’ responsibilities of democratic self-government, specifically enabling them to understand issues, judge government decisions and assist in wise, effective decision-making. Meiklejohn claims

⁸⁷ *Von Hannover* (n 85) [63]. This distinction has been approved in: *McKennitt* (n 74) [58]; *Prince of Wales* (n 52) [51]; *Donald* (n 84) [20].

⁸⁸ *Mosley v UK* (n 74) [114]; *Axel Springer* (n 52) [91]; *Von Hannover (No 2)* (n 54) [110].

⁸⁹ *ETK* (n 8) [23].

⁹⁰ *ibid* [21].

⁹¹ *Abbey v Gilligan and another* [2012] EWHC 3217, [90].

⁹² Tugendhat J stated: ‘it is in the public interest that there should be public discussion of the circumstances in which it is proper for a chief executive (or other person holding public office ...) [to] be able to carry on a sexual relationship with an employee in the same organisation.’ *Goodwin v NGN Ltd* [2011] EWHC 1437, [132]-[133].

⁹³ Bork (n 83) 26-28. A similar public interest-based argument in relation to officials is advanced by Samuel Warren and Louis Brandeis in ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193, 214-6.

⁹⁴ *Axel Springer* (n 52) [90]; *Von Hannover (No 2)* (n 54) [109].

that ‘Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to welfare that, in theory, casting a ballot is assumed to express’.⁹⁵ As a result, he views the expression that aids citizens’ roles to encompass educational, artistic and scientific expression.⁹⁶ An alternative, though less influential justification, individual self-development,⁹⁷ justifies yet broader protection for expression that informs non-political debate. Redish, for example, claims that all free expression rationales, including democratic process, are ultimately reducible to this core justification.⁹⁸ He argues that individual self-realisation, which includes self-governance and the development of individual faculties,⁹⁹ is not restricted to the political realm.¹⁰⁰ Instead individual self-development extends to foster private life choices which are a matter for the individual.¹⁰¹ In similar terms, Perry advocates an ‘epistemic’ free expression justification based on the cultivation of one’s essential human capacities¹⁰² which entails protection for expression that aids personal choices. Perry questions the democratic justification’s assumed distinction between an individual’s political and personal choices (and thus the expression necessary to inform each). For Perry, both are ultimately informed by a person’s moral-political vision so there is no reason to value one more than the other.¹⁰³ These justifications indicate that valued expression should logically extend beyond the political to that which stimulates wider social or moral debate and, as such, they suggest a broader rendering of public interest.

*Spelman v Express*¹⁰⁴ provides an apt example of this broader understanding of debate. Though the *Spelman* story did not involve strictly political issues (notwithstanding the claimant’s Cabinet minister mother), the wider social issues it tapped into, namely schools’ duties to pupils and pressures on children in high-level sports, qualified it as legitimate ‘public debate’ in the court’s view.¹⁰⁵ In *McClaren* a similarly broader approach was taken. Here the court permitted publication of the former England manager’s extra-marital affair on the basis that he was a ‘public figure’ and the defendant thus had a ‘legitimate interest’ in publication. The court cited comments from Terry in support of its decision, claiming that ‘freedom to criticise’ the behaviour of others is a valuable freedom, and ‘as a

⁹⁵ Emphasis added. Meiklejohn (n 83) 255.

⁹⁶ *ibid* 257.

⁹⁷ Outlined by Wragg (n 80) 192-194.

⁹⁸ Martin H Redish, ‘The Value of Free Speech’ (1982) Vol 130, *University of Pennsylvania Law Review*, 591, 594, 601.

⁹⁹ *ibid* 627

¹⁰⁰ *ibid* 604.

¹⁰¹ ‘[I]t is not for [state institutions] ... to determine what communications or forms of expression are of value to the individual; how the individual is to develop his faculties is a choice for the individual to make.’ *ibid* 637.

¹⁰² Michael J Perry, ‘Freedom of Expression: An Essay on Theory and Doctrine’ (1983) Vol 78, *Northwestern University Law Review* 1137, 1157.

¹⁰³ *ibid* 1160-1161; 1149.

¹⁰⁴ *Spelman v Express Newspapers* [2012] EWHC 355

¹⁰⁵ *ibid* [104]-[105].

result of public discussion and debate ... public opinion develops'.¹⁰⁶ Though there has been support for maintaining a narrow political understanding of expression that fosters debate in the public interest,¹⁰⁷ the cases outlined here highlight the problematic nature of neatly partitioning disputed expression as pertaining to the 'political', 'social' or 'moral'. Most disputed stories will involve all three dimensions to varying degrees, making the dichotomous choice of situating a specific publication (or fragment of it) within or beyond the 'public interest' category a somewhat crude one.

Preventing the public from being misled

The second form of public interest expression is that which reveals that the public has been misled and/or highlights hypocrisy.¹⁰⁸ In such circumstances, according to Eady J, the court must ask 'would publication in some way prevent the public from being seriously misled?'¹⁰⁹ Or is the intrusion of publication necessary and proportionate 'to prevent the public from being significantly misled by [the claimant's] public claims'.¹¹⁰

This justification was illustrated in *Campbell* where the claimant accepted that her false claims to be drug-free justified the defendants setting the record straight, albeit shorn of unnecessary detail.¹¹¹ Similarly, Rio Ferdinand's self-depiction as a reformed, mature family man justified the *Sunday Mirror's* publication of a story (and corroborating photo) of his adulterous affair.¹¹² Here Nicol J claimed that this form of public interest argument is ultimately premised upon the importance of revealing truth.¹¹³ This proposition is supported more generally by the ECtHR guidance in *Axel Springer* which confirms that the veracity of the disputed information is a relevant criterion in the balancing exercise.¹¹⁴ It thus corresponds to one of the fundamental justifications for free expression, rooted in John Stuart Mill's *On Liberty* thesis, that the free exchange of ideas ultimately furthers the discovery of truth.¹¹⁵ Yet Mill's argument applied almost indiscriminately to a wide range of expression, even (counter-intuitively) that which was false¹¹⁶ or of 'low quality'.¹¹⁷ This is because

¹⁰⁶ Terry cited in *McClaren v News Group Newspapers Ltd* [2012] EWHC 2466, [19].

¹⁰⁷ See eg *Wragg* (n 51).

¹⁰⁸ Note here the influence of PCC Code (n 78).

¹⁰⁹ Emphasis added. *CTB v News Group Newspapers (Giggs)* [2011] EWHC 1232, [25].

¹¹⁰ Emphasis added. *Mosley* (n 54) [131].

¹¹¹ *Campbell* (n 52) [117].

¹¹² *Ferdinand* (n 85). See also *Abbey v Gilligan* (n 91) [80]-[81].

¹¹³ (n 85) [67]. See also: *XWY v Gewanter & Others* [2012] EWHC 496, [62] (Slade J).

¹¹⁴ *Axel Springer* (n 52) [93].

¹¹⁵ See John Stuart Mill, *On Liberty & Other Essays*, (Oxford: Oxford, 1998) Ch II, specifically 34.

¹¹⁶ '[T]he peculiar evil of silencing the expression of opinion is, that it is robbing the human race ... If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.' *ibid* 21. See also 54.

for Mill, truth was just part of the issue; as Wragg explains, his main concern was how individuals hold their truths.¹¹⁸ Mill repeatedly and eloquently stressed the importance of debate and interaction with opposing views so that truths could be actively tested, properly understood and rationally held rather than being passively received, ‘encrusting and petrifying [the mind] against all other influences’.¹¹⁹ So the truth justification for free expression does not precisely fit with the narrower misleading the public ground. In *Mosley Eady J* expressly stated that this rationale could not justify all factual publications in any circumstances.¹²⁰ Thus, like the democratic debate rationale, the truth justification rests to some extent on the inherent benefits of individual engagement in debate, dialectic and intellectual interaction. Indeed the two justifications are viewed as inherently linked.¹²¹

Revealing crime or serious misdeeds

The final public interest-based argument used by defendants is that the proposed publication reveals serious misdeed or criminal conduct.¹²² In doing so the relevant speech serves a ‘legitimate social purpose’.¹²³ This ground is aptly illustrated in *Browne* where the Court of Appeal upheld *Eady J*’s judgment allowing publication of select information from a former partner of BP’s Chief Executive which revealed that the latter had improperly put company resources to personal use.¹²⁴ The ground was also considered in *Hutcheson v News Group*. When considering whether to grant an interim injunction in this case, the Court of Appeal held that the defendant had ‘strong’ and ‘powerful’ public interest justifications to publish the fact that the claimant had a second family ‘to authenticate the allegation of diversion of corporate funds for private purposes’.¹²⁵ Otherwise there was a risk of a distorted, partial picture to public.¹²⁶ This third public interest ground is broadly based upon a combination of the truth and democratic debate justifications already discussed. By their very nature, crime and corruption will invariably involve deceit or surreptitious activity, and thus revealing such activity will disclose the true position to the wider public. Furthermore, this ground serves general

¹¹⁷ Mill was expressly unconcerned with quality of expression and dismissed restraints on expression on the basis of its usefulness to society thus: ‘The usefulness of an opinion is itself a matter of opinion: as disputable, as open to discussion, and requiring discussion as much, as the opinion itself.’ *ibid* 27.

¹¹⁸ (n 81) 365.

¹¹⁹ (n 115) 46, and 40-46 generally.

¹²⁰ ‘Nor can it be said, without qualification, that there is a “public interest that the truth should out”’. *Mosley* (n 54) [10].

¹²¹ (n 81) 382; *Barendt* (n 82) 18.

¹²² As per the PCC Code (n 78). It was indicated in *Mosley* that any criminal conduct revealed must be more than trivial; (n 54) [117].

¹²³ *Giggs* (n 109) [25].

¹²⁴ (n 71) [54]-[55].

¹²⁵ *Hutcheson v News Group* [2011] EWCA Civ 808, [45]-[46], [48].

¹²⁶ *ibid* [45].

democratic ideals by fostering accountability.¹²⁷ Fenwick and Phillipson confirm that the democracy justification ‘encompasses the function which a free press performs in exposing abuses of power.’¹²⁸

The media in ‘public interest’

The media is ascribed a vital and specific role within the concept of public interest; that of ‘public watchdog’. This appealing metaphor has been adopted by the House of Lords¹²⁹ and ECtHR,¹³⁰ as well as the Leveson Report which stated that ‘a free press serves the interests of democracy ... through its public watchdog role, acting as a check on political and other holders of power.’¹³¹ The watchdog trope has a discernible rhetorical effect; it casts the media as observer, scrutiniser and also guardian, protector of the public. As ‘watchdog’, its function is to alert, warn and inform the public it is charged with protecting.¹³² The media’s paternalist role is also apparent, for example, in Churchill’s romanticised depictions of the press as ‘unsleeping guardian’ and ‘vigilant guardian’,¹³³ and in Mill’s claim that it provides ‘security’ against ‘corrupt or tyrannical government’.¹³⁴ All are consistent with the enduring ideal of the media as a noble ‘fourth estate’. The various ways in which the media fulfils its protective watchdog role are elaborated in the following influential passage by Sir John Donaldson MR quoted in recent MPI caselaw:¹³⁵

‘The media ... are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the view of minorities they perform an invaluable function.’¹³⁶

Here the media are portrayed as a progressive force, as defenders of the marginalised and downtrodden. Interestingly, this passage also features a second salient metaphor: the media as a ‘foundation’ of democracy. The Court of Appeal in ETK used similar imagery, claiming the media forms a ‘powerful pillar of democracy’.¹³⁷ Implicit in such metaphors is that without this pillar or foundation, democracy would significantly weaken or even collapse.

¹²⁷ See Blasi’s arguments outlined in by Redish (n 98) 611-616.

¹²⁸ (n 81) 683.

¹²⁹ Campbell (n 52) [107]. See also: ETK (n 8) [13]; Spelman (n 104) [48].

¹³⁰ Von Hannover (No 1) (n 85) [63]; Mosley v UK (n 74) [114]; Axel Springer (n 52) [91]; Von Hannover (No 2) (n 54) [102]; Krone Verlag (n 86) [48].

¹³¹ Leveson Report (n 2) Pt B, Ch 2, [4.3].

¹³² Derrida’s ideas in *The Beast & The Sovereign* are relevant here. See eg his account of the wolf metaphor across political philosophy; (n 22) 4-6, 9-12.

¹³³ Leveson Report (n 2) Pt B, Ch 2, 56.

¹³⁴ (n 115) 20.

¹³⁵ Terry (n 52) [102]; Spelman (n 104) [102].

¹³⁶ *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 (CA), 413.

¹³⁷ (n 8) [13]. Quoted in *Weller & Others v Associated Newspapers Ltd* [2014] EWHC 1163.

The highly idealised status as upholders of truth and democratic values is limited to the press in its capacity of reporting on matters of public interest of the types discussed. The ECtHR has expressly stated that the media only undertakes its ‘watchdog’ role in this context.¹³⁸ The weight of press expression is conditional on the extent to which its reportage serves this abstract public interest-watchdog function. Courts have thus repeatedly expressed concern to ensure such journalism will not be inhibited by the principles they are fashioning.¹³⁹

These passages indicate, and commentators agree, that media freedom of expression is of instrumental value, to be judged by the benefits it brings to the public.¹⁴⁰ The press watchdog role is deemed a duty based upon the public’s right to receive information.¹⁴¹ So the ‘interest’ of the public in this context is a sort of stake or right, and this is arguably attributable to the dominant influence of democracy and truth justifications that underpin free expression in this area.¹⁴² Such is the public’s stake here, that some have proposed that judicial assessments in MPI should be more public-centred. Tugendhat & Christie suggest that ‘it would aid the clarity and quality of decision-making if the public’s right to know were expressly considered as a matter of course’,¹⁴³ though the courts have occasionally considered general public interest issues independently of media defendants’ legal arguments.¹⁴⁴ Phillipson has also argued that where rights conflict, courts ‘must assess the free speech side of the equation only by reference to instrumental, audience-based justifications.’¹⁴⁵

3.2 ‘Interesting to the public’

‘What interests the public’ is the alternative category that features in MPI judgments, representing the counterpart or opposite of public interest, particularly in its democratic debate form. In *Rocknroll v News Group*, the court cast the speech ‘hierarchy’ as a dualist ‘spectrum’ with contribution to democratic debate ‘at one end’ and material viewed as interesting the public ‘at the other end’¹⁴⁶

¹³⁸ *Von Hannover* (No 1) (n 85) [63]; *Mosley v UK* (n 74) [114]. See also: *Spelman* (n 104) [48]; *Rocknroll* (n 85) [30], [35].

¹³⁹ *Mosley* (n 53) [234]. See also *ETK* (n 8) [13].

¹⁴⁰ Gavin Phillipson, ‘Leveson, the Public Interest and Press Freedom’ (2013) 5(2) *Journal of Media Law* 220-240, 220; Jan Oster, ‘Theory and Doctrine of ‘Media Freedom’ as a Legal Concept’ (2013) 5(1) *Journal of Media Law* 57-78, 73.

¹⁴¹ *Axel Springer* (n 52) [79]. See also *Von Hannover* (No 2) (n 54) [102]. Quoted in *Spelman* (n 104) [52]. See also Professor Christopher Megone quoted in *Leveson Report*, (n 2) Pt B, Ch 2, [4.1].

¹⁴² *Barendt* (n 82) 25-6; *Oster* (n 140) 69, 73.

¹⁴³ (n 63) 12.154.

¹⁴⁴ *TSE v NGN Ltd* [2011] EWHC 1308 (QB), [7], [23], [27]; *JIH v News Group Ltd* [2011] EWCA Civ 42, [21].

¹⁴⁵ Emphasis added. Phillipson (n 140) 231; 227.

¹⁴⁶ (n 85) [30].

Briggs J referred to these as ‘two categories’,¹⁴⁷ reinforcing the nature of the dichotomy. Within this binary opposition, ‘interesting to the public’ is the subjugated concept; ‘it is **not enough** for information to be interesting to public’.¹⁴⁸ As a result, judges have limited concern with this category. In Goodwin, Tugendhat J claimed that though judges have the ‘final say’ on what constitutes the public interest, newspaper editors have final say on what is ‘interesting to the public’, thus demarcating their respective domains.¹⁴⁹ Yet it is highly illuminating to survey judicial approaches to expression they categorise as falling short of the public interest benchmark.

‘Interesting’

The first point to note in the dichotomy is the shift from ‘interest’ in the privileged concept to ‘interesting’. This shift represents a move away from ‘interest’ as a normative term with connotations of the public’s right or stake in the expression. In this new context it becomes a descriptive term to designate information that entertains or attracts the public’s attention,¹⁵⁰ and thus, implicitly, something less important.

As discussed in Part 3.1, the distinction between public interest and non-public interest expression is present in leading cases such as Campbell¹⁵¹ and Von Hannover.¹⁵² In other cases the dichotomy has been couched in more explicit terms. The court in CC v AB, drawing on Campbell, stated ‘there are different categories of ‘speech’ to which greater or lesser importance may be attached (eg what has been called “political speech” versus “vapid tittle-tattle”)’.¹⁵³ Similarly, in Mosley the court stated that ““political speech” would be accorded greater value than gossip or “tittle tattle””.¹⁵⁴ Judicial categorisation of certain expression as trivial tittle-tattle shows a clear (and arguably justifiable) circumspection towards such reportage. This disdain is particularly apparent in Mosley where Eady J had ‘little difficulty’ in concluding there was no legitimate public interest in video footage of the claimant engaging in private sado-masochistic sexual activities; ‘The only reason these pictures are of interest is because they are mildly salacious and an opportunity to snigger’.¹⁵⁵ He went on to say that

¹⁴⁷ *ibid* [32].

¹⁴⁸ Emphasis added. DFT v TFD [2010] EWHC 2335, [19].

¹⁴⁹ (n 92) [2].

¹⁵⁰ These two distinct uses of the concept are identified by Barendt, who refers to the ‘public interest, whether this conception is understood descriptively or normatively.’ (n 82) 244.

¹⁵¹ Lord Nicholls deemed Naomi Campbell’s NA treatment details ‘lower order expression’, than (eg) political information because it served no pressing social need and no political values were at stake; Campbell (n 52) [29].

¹⁵² In Von Hannover (No 1) the ECtHR held that photographs of Princess Caroline’s routine daily activities made no positive contribution to debate; (n 85) [65], [76].

¹⁵³ Emphasis added. CC v AB [2006] EWHC 3083, [6].

¹⁵⁴ (n 54) [15]. See also: X v Persons Unknown [2006] EWHC 2783, [25].

¹⁵⁵ (n 54) [31]. Subsequently quoted in Rocknroll (n 85) [33].

‘Titillation for its own sake could never be justified. Yet it led many thousands of people to see the footage’.¹⁵⁶ Elsewhere judges dismissed similar types of reportage involving revelations about private sexual conduct as ‘tawdry allegations’,¹⁵⁷ ‘vapid tittle tattle’,¹⁵⁸ ‘salacious’¹⁵⁹ and ‘satisfy[ing] public prurience’.¹⁶⁰ Such characterisations are perhaps a natural consequence of the nature of reportage disputed in the vast majority of MPI cases, most of which is ‘kiss and tell’ (or rather, ‘kiss and sell’).

Despite operating as a dichotomy the categories of ‘public interest’ and ‘interesting to the public’ are not mutually exclusive. There is judicial acknowledgement that stories in the public interest may also interest the public. The point is illustrated by reference to the 1960s Profumo affair which, according to the following passages, involved public interest issues and a titillating sexual element:

‘I have little doubt that sexual relationships involving those who are in the public eye ... are generally likely to be interesting to the public, but they will not necessarily be of genuine public interest. Sometimes, as for example long ago in the case of the ‘Profumo scandal’, the information will fulfil both criteria.’¹⁶¹

‘... whether publication is sought to genuinely inform public debate, or rather merely to titillate the undoubted interest of a section of the public in the sexual or other private peccadillos of prominent persons. The two categories are not necessarily exclusive, as the Profumo scandal vividly illustrates.’¹⁶²

A marked assumption underlying these passages is that only matters of a lurid sexual nature will or can interest the public.

The media role in ‘interesting to the public’ can be illuminatingly contrasted with its idealised watchdog function in the public interest context. In this role the press are purveyors of trivia and scandal that serves no useful social function and has no (or very limited) qualitative value. Such coverage has been criticised as ‘Pseudo public interest journalism [which] discredits the genuine article, is not assessable by its audiences and damages the reputation of the media.’¹⁶³ Yet such criticisms can be traced back to Warren and Brandeis’ seminal 1890 article which advocated the creation of a privacy right to protect individuals from then emerging developments in the media.

¹⁵⁶ *ibid* [132]. See also *Mosley v UK* (n 74) [130]

¹⁵⁷ *Mosley v UK* (n 74) [114].

¹⁵⁸ *Donald* (n 84) [22].

¹⁵⁹ *CDE* (n 78) [25].

¹⁶⁰ *ETK* (n 8) [23].

¹⁶¹ *CC v AB* (n 153) [37] (Eady J).

¹⁶² *Rocknroll* (n 85) [32] (Briggs J)

¹⁶³ Professor Baroness O’Neil quoted in *Leveson Report*, (n 2) Pt B, Ch 4, [4.4].

Here, the authors made numerous emotive and openly rhetorical claims about the tabloid-style reportage of the day. They accused the press of ‘overstepping ... bounds of propriety and decency’ and acting with ‘effrontery’. The gossip they published was deemed ‘unseemly’, an ‘evil’ which ‘both belittles and perverts’ and which ultimately leads to ‘lowering of social standards and of morality’. In summary, they argued, ‘Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.’¹⁶⁴ These various depictions bring to mind the ‘prole-feed’ cynically produced by the Ministry of Truth to placate, distract and manipulate the populace in Orwell’s prescient dystopia.¹⁶⁵

Information ‘interesting to the public’ is deemed entertaining rather than empowering, entirely inconsequential, or even pernicious. For this reason, trivia or tittle-tattle – that which is ‘merely’ interesting to the public – has low value in the balancing process. This is reflected in the ECtHR’s comments in *Mosley* that ‘Different considerations apply to press reports [regarding] sensational and, at times, lurid news, intended to titillate and entertain’.¹⁶⁶ It confirmed that where disputed expression is for entertainment rather than (eg) educational purposes,¹⁶⁷ the Article 10 right is given a narrower interpretation. As a result, Art 8 will rarely yield in priority to the Art 10 right to freely express tittle-tattle.¹⁶⁸ Yet, as the individual self-development justifications outlined at Part 3.1 demonstrate, the general distinction between the innate value of political and non-political (eg, entertaining) expression is by no means settled. This was acknowledged by the German Constitutional Court in *Von Hannover* (No 1). It noted the merger of reportage and entertainment, cautioning that it should not be ‘unilaterally presume[ed] that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion’, but that it may also fulfil important social functions, for example by sparking discussion of issues, values and life philosophies.¹⁶⁹ It thus rejected a strict dichotomous categorisation of expression, stating:

‘The formations of opinions and entertainment are not opposites. Entertainment also plays a role in the formation of opinions. It can sometimes even stimulate or influence the formation of opinions more than purely factual information.’¹⁷⁰

¹⁶⁴ (n 93) 196.

¹⁶⁵ Orwell described ‘prole-feed’ as ‘proletarian literature, music, drama and entertainment generally. ... rubbishy newspapers containing almost nothing except sport, crime and astrology, sensational five-cent novelettes, films oozing with sex, and sentimental songs which were composed entirely by mechanical means.’ George Orwell, *Nineteen Eighty-Four* (London: Penguin, 1990) 46.

¹⁶⁶ (n 74) [114]. Later cited in *Rocknroll* (n 85) [30]. See also: *Ferdinand* (n 85) [62].

¹⁶⁷ *ibid* [131].

¹⁶⁸ *Giggs* (n 109) [33].

¹⁶⁹ Recited by the ECtHR in *Von Hannover* (No 1) (n 85) [25].

¹⁷⁰ Emphasis added. *ibid*.

This provides further indication that the distinctions underpinning the public interest/interesting the public divide are constructed and contestable. Indeed even the negligible worth of trivia and gossip cannot necessarily be automatically assumed, and its select redeeming qualities have been noted.¹⁷¹

'Public'

Some notable points regarding the 'public' in this second category also become apparent upon further examination. A salient starting point is Warren & Brandeis' account of the trivia-reading public who the authors depict in a manner similar to the trivia they deplore. For example, they claim that such gossip satisfies 'a prurient taste', 'occup[ies] the indolent', appeals to human weakness and misleads the 'ignorant and thoughtless'.¹⁷² It is difficult not to see such generalisations as silently influenced by a sort of elitist condescension of, or distaste for, the 'masses'.¹⁷³

One must also note recurring judicial comments regarding the 'public' in this context. For example, in *Von Hannover*, the ECtHR concluded that the sole purpose of the disputed photographs and accompanying reportage was to 'satisfy the curiosity of a particular readership'.¹⁷⁴ It made similar comments in *Mosley*, referring to sensational 'press reports ... which are aimed at satisfying the curiosity of a particular readership'.¹⁷⁵ Similarly, in *OPQ* the court dismissed the social value of 'publications whose sole aim is to satisfy curiosity of a certain public'.¹⁷⁶ More recently Briggs J in *Rocknroll* described publications intended 'merely to titillate the undoubted interest of a section of the public'.¹⁷⁷ Cumulatively, these comments indicate that this 'public', essentially comprised of tabloid consumers, is not representative. It forms a select social group; a group narrower than the broad, civic, ideal totality represented in 'public interest'. In this context the term 'public' shifts in meaning from its use in public interest proper. The logical effect of this shift is to marginalise or underplay this group in size, significance and voice; it implies that this group is a niche demographic and certainly not representative of the wider 'public', thus discreetly justifying judicial subjugation of the 'interesting to the public' category.

¹⁷¹ See, eg, the comments of Tugendhat J in *Terry* (n 52) [97]-[105]. See also: Wragg (n 80) 194, 197; Diane L Zimmerman, 'Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort' (1983) 68 *Cornell Law Review* 291, 326-341 ('A case for the positive value of gossip').

¹⁷² (n 93) 196.

¹⁷³ Zimmerman also notes the elitist undertones in Warren & Brandeis' account of 'the hapless citizenry', claiming, 'To argue that the press merely "panders" to public taste at the lowest common denominator is to make a class-based judgment about the value of information that people seek.' (n 171) 334, 354.

¹⁷⁴ Emphasis added. (n 85) [65]. The ECtHR used the same terminology in *Axel Springer* (n 52) [91].

¹⁷⁵ Emphasis added. (n 74) [114].

¹⁷⁶ Emphasis added. *Leempoel v Belgium* quoted in *OPQ v BJM* [2011] EWHC 1059, [25].

¹⁷⁷ Emphasis added. (n 85) [32]. This has also passed into academic accounts: Oster (n 140), 68 ('a curious few'); 75 ('what (a part of) the public wants to know.')

Further revealing comments about the public in this category feature in the Leveson Report. In the course of evidence, proprietor of the Express Group, Richard Desmond, claimed simply to be giving the public ‘what they want to read and watch’, essentially what interests them.¹⁷⁸ Leveson found that a number of the newspaper editors who gave evidence¹⁷⁹ held ‘a conception of the public interest that was essentially defined by what interested the readership.’¹⁸⁰ These witnesses justified their exposés in terms of the public interest, but when asked to elaborate on their understandings of the term, defined it with reference to the reader demand; this public is ‘the consumer’, ‘the market’. So what interests the public (or editors’ perceptions of it) strongly influenced the editors’ views of whether a publication was in the public interest.¹⁸¹ This led Leveson to find

‘there has been, within parts of the press, a conflation of the public interest with what interests the public, such that individual dignity and privacy is ignored to satisfy the demands of a readership.’¹⁸²

Leveson also concluded that press mechanisms for considering wider public interest issues before publication of potentially intrusive stories were inadequate.¹⁸³ Such findings lend support to Tugendhat J’s argument that determining the public interest must be the job of judges, not editors.¹⁸⁴ Editors confuse, overlap or fail to properly distinguish between public interest and interesting the public, whereas judges do not.¹⁸⁵

Commercial aspect of ‘interesting the public’

One crucial aspect of ‘interesting the public’ is its implicit association with the commercial context in which newspapers operate. Newspapers are commercial enterprises in a liberal free market system and must be profitable to exist. They are subject to general commercial imperatives, particularly the need to integrate into the market by meeting the demands of shareholders and directors, and to attract advertising revenues.¹⁸⁶ To maintain vital profits, newspapers must maintain their readership by

¹⁷⁸ Leveson Report (n 2) Pt F, Ch 6, [2.62].

¹⁷⁹ These included: Tina Weaver, former editor of the Sunday Mirror; Hugh Wittow of the Daily Express; Dawn Neesom of the Daily Star; Richard Wallace, former editor of the Daily Mirror. *ibid* [2.64]-[2.65].

¹⁸⁰ *ibid* [2.64].

¹⁸¹ *ibid* [2.63]-[2.66]. See also [5.27].

¹⁸² Emphasis added. *ibid* [5.38]. Note again, the reference to ‘a readership’.

¹⁸³ *ibid* [2.72]-[2.76].

¹⁸⁴ (n 149) above.

¹⁸⁵ But see the early case of *Flitcroft* (n 52) where the Court of Appeal stated: “In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information.” at [11](xii). This was later discredited by the Court of Appeal in *McKennitt* (n 74) [64].

¹⁸⁶ These constitute the first two of five ‘news filters’ that subtly limit and direct which events are reported and how. Edward Herman & Noam Chomsky, *Manufacturing Consent, The Political Economy of the Mass*

producing content that is appealing and even entertaining. In short, newspapers' commercial sales rely directly upon their ability to interest the public. These commercial realities are acknowledged across MPI caselaw and wider literature.

The current commercial pressures on British newspapers were discussed in the Leveson Report.¹⁸⁷ Leveson highlighted the challenges of internet-based competition to traditional newspapers, particularly when the latter must continue to meet the financial costs of producing news.¹⁸⁸ It also confirmed 'significant' declines in newspaper sales since 1990.¹⁸⁹ The commercial challenges facing the newspaper industry are also acknowledged as a sort of background fact in certain MPI cases. For example, in *Campbell* Baroness Hale claimed:

'One reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all.'¹⁹⁰

The assumption underlying this statement is that newspapers (of all kinds) are 'good'. They must sell copies to ensure their continued existence, thus maintaining this 'good'.¹⁹¹ This rationale was echoed by the Court of Appeal in *ETK*. Though it granted an interim injunction to prevent publication of the claimant's extra-marital affair, the court stressed that such restrictions must be proportionate to the legitimate aim pursued. Restricting beyond this would have 'the wholly undesirable chilling effect on the necessary ability of publishers to sell their newspapers. We have to enable sales if we want to keep our newspapers'.¹⁹² Elsewhere, Tugendhat J's Spelman judgment featured extracts of a defence witness statement from Mr Morgan, Editor of the *Daily Star*. Mr Morgan denied financial motives for contesting the injunction, before referring to such pressures on press in the following terms: 'Exclusive stories are the very lifeblood of the Sunday press. The commercial imperative of the exclusive should not be underestimated at a time when Britain's newspapers are fighting for their very survival.'¹⁹³ More recently in *Weller v Associated Newspapers*, the Mail Online Editor's evidence emphasised the tough commercial market faced even by internet-based publishers.¹⁹⁴ Despite the

Media (London: Vintage, 1994) 1-17. See also: Steven Shiffrin, 'The Politics of the Mass Media and the Free Speech Principle' *Indiana Law Journal* 69 (1994) 689, 694-713.

¹⁸⁷ Leveson Report (n 2) Pt C, Ch 1.

¹⁸⁸ 'Whilst newspapers are losing their share of the market, the costs of producing the news are not reducing significantly and much of the competition on the internet comes from organisations which are not, themselves, originators of news content.' *ibid* [2.2].

¹⁸⁹ Leveson confirms that since 1990 popular national press sales have fallen by around 40% and quality nationals by 25%, a decline accelerated since 2005. *ibid* [2.8]-[2.9].

¹⁹⁰ *Campbell* (n 52) [143].

¹⁹¹ Interestingly, in this statement free expression becomes instrumental to sales; this is 'one reason' for its importance.

¹⁹² *ETK* (n 8) [13].

¹⁹³ (n 104) [24].

¹⁹⁴ (n 137) [145]-[147].

Mail's apparent rude health as the most visited newspaper website in the world, this claim was accepted by Dingemans J.¹⁹⁵ All of these comments acknowledge the importance of sales to newspapers, and are couched in high stakes terms; the very existence of papers in general depends on their profitability. Sales equal survival.¹⁹⁶

In turn, as acknowledged in Goodwin, newspaper sales are reliant on attracting and interesting the consuming public. Here Tugendhat J quoted a passage cited earlier in Donald v Ntuli.¹⁹⁷ It states:

‘A requirement to report ... in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.’¹⁹⁸

Tugendhat J used this passage to support his claim that the name and job title of Fred Goodwin's mistress were important parts of the defendant's proposed story.¹⁹⁹ Yet it acknowledges that such restrictions may hinder reporting and make it difficult for papers to attract and engage readers in order to profit. The link between interesting the public and commercial sales was also acknowledged in Weller.²⁰⁰

Elsewhere, the select committee on privacy and injunctions has expressed the view that frivolous content is necessary to maintaining readers:

‘Few newspapers consist solely of serious news stories. Most of them rely, to varying degrees, on some form of light-hearted reportage or gossip. It may not be easy to present a clear explanation as to why such articles are of themselves in the public interest, but it can be argued that without them readership of newspapers would decline even further.’²⁰¹

¹⁹⁵ *ibid* [149].

¹⁹⁶ Phillipson terms this the ‘economic survival’ argument: (n 140) 232.

¹⁹⁷ (n 84) [55] (Maurice Kay LJ).

¹⁹⁸ Goodwin (n 92) [110]. Quoting Lord Rogers in *Re Guardian News & Media* [2010] UKSC 1. This quote was originally made in the context of anti-terror legislation. Also, note repetition of the high stakes; the survival of the press is at stake.

¹⁹⁹ *ibid* [111].

²⁰⁰ ‘Mail Online hoped that publication of the photographs would assist in maintaining public interest in the Mail Online and therefore profitability.’ (n 137) [180] (Dingemans J). See also [175].

²⁰¹ *Emphasis added. Privacy and Injunctions* (n 1) [88].

All of these statements involve the uncontroversial proposition that newspapers must interest the public to maintain sales. In essence, ‘interesting the public’ directly corresponds with the media’s commercial interests, and this is the case as long as the press operates in a free market system; ‘interesting the public’ thus represents commercial realities. Media/privacy discourse does not expressly claim that gossip and titillation is the only form of expression that can ‘interest the public’, though it certainly does not offer any alternative examples of material that may do so. It is also pertinent that the public interest maxim has been repeatedly deployed in this specific context; it is clearly viewed by judges as particularly apt to the tabloid material disputed in these cases. Furthermore, MPI discourse does overwhelmingly characterise expression within the ‘interesting the public’ category as tittle-tattle and scandal. For example, the trivial, celebrity nature of ‘interesting to the public’ expression is implicit in the select committee comments and Profumo examples outlined above²⁰² and, significantly, in the widespread legal recognition that private information is a lucrative commodity per se. The most high profile recognition that the personal or ‘trivial’ is significant (in economic terms) is in Council of Europe Resolution 1165 which stated:

‘personal privacy is often invaded ... as people’s private lives have become a highly lucrative commodity for certain sections of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales.’²⁰³

This resolution has been widely cited at national²⁰⁴ and European level.²⁰⁵ It confirms that one (or perhaps the) key driver of intrusive publications is the commercial value of stories revealing private information.²⁰⁶ But private information can only be a lucrative commodity because large sections of the public (or market) are willing to pay for it. Thus, the very presence of this rationale highlights a contradiction across MPI caselaw reasoning. The courts depict tabloid readers as ‘a certain’ readership, a narrow group not broadly representative of the wider populace. Yet the passages discussed here indicate the consuming ‘public’ or consumer base for gossip and trivia is far larger in size than this terminology suggests.

In short, a commercial context narrative is woven throughout MPI caselaw and related literature. The newspaper industry’s commercial viability depends on sales, which in turn depend on interesting the

²⁰² At (n 161), (n 162), (n 201).

²⁰³ (n 54) [6].

²⁰⁴ *Flitcroft* (n 52) [11](xii); *Spelman* (n 104) [49]. See also *TSE v News Group* [2011] EWHC 1308, [26].

²⁰⁵ *Mosley v UK* (n 74) [131], [57]; *Axel Springer* (n 52) [51]; *Von Hannover (No 2)* (n 54) [71].

²⁰⁶ Though, as *Douglas v Hello!* demonstrates, high-profile individuals may exploit such information for their own financial gain: *Douglas v Hello! Ltd* [2007] UKHL 21.

public. Private information, specifically of the ‘kiss and tell’ variety in MPI disputes, interests the public and generates sales. In this sense ‘interesting the public’ directly corresponds with media commercial interests and represents commercial realities. As Part 4.2 argues, such issues prove to have a significant bearing on the separability of the opposing concepts in the public interest dichotomy.

[4] Deconstructing the public interest dichotomy: a ‘crisis of versus’?

A deconstructive reading of MPI caselaw has revealed that the Art 8/10 balance is heavily influenced by a prominent binary opposition that routinely privileges expression in the ‘public interest’ over and above expression that merely ‘interests the public’. This part undertakes deconstructive analysis and considers to what extent are these two concepts stable, distinct or mutually reliant? What discreet rhetorical or ideological dynamics may operate behind them?

4.1 Subjectivity and the Dichotomy

Within the Art 8/10 balancing exercise, public interest versus interesting the public represents a vital ‘axis around which conflicting legal argumentation is built’.²⁰⁷ Each concept represents an alternative mode of expression. A range of judicial statements in MPI caselaw indicate that expression in the public interest has a serious, earnest quality; it has a political content, or taps into political or social issues that lend the expression a gravity or wider importance. ‘The test required to justify publication is a high one, “exceptional public interest”’.²⁰⁸ Furthermore, numerous cases confirm that this high benchmark will be gauged objectively.²⁰⁹ Therefore, impartial judges are naturally best placed to make such an assessment and will have the ‘final say’ on public interest.²¹⁰

Whilst public interest expression is characterised as exceptional, significant and objective etc., expression that interests the public is correspondingly characterised dismissively as trivial, frivolous and salacious. Yet, numerous MPI decisions do not necessarily corroborate such clean cut judicial characterisations of each category. It seems that understandings of public interest rest upon abstract

²⁰⁷ Frug (n 45) 1324.

²⁰⁸ Emphasis added. AAA v Associated Newspapers Ltd [2012] EWHC 2103, [118].

²⁰⁹ Ferdinand (n 85) [64]; ETK (n 8) [19]; Abbey v Gilligan (n 91) [107]; [45].

²¹⁰ Goodwin (n 92) [2] (Tugendhat J).

distinctions that are arguably tenuous, particularly at their borders. At its core, the public interest rests upon a basic distinction between significant/trivial or important/unimportant expression. The most influential factor determining whether expression is significant or trivial is whether or not it pertains to the political. But if one acknowledges the political, the moral and the social as fundamentally entwined, the political/non-political distinction is brought into question. This ambiguity is supplemented (and complicated) by the issue of whether ‘entertaining’ speech must be assigned to the trivial, as British caselaw tends to assume, or whether it can provide a crucial means of facilitating significant political, moral or social debate. This latter point appears reliant upon tenuous speculations about tabloid readers’ interactions with such material; are they driven by base, prurient, morbid motivations, or is their engagement more profound, shrewd or thoughtful?

As caselaw demonstrates, such ambiguities have implications for the conclusive categorisation of a media defendant’s speech as within or beyond the ‘public interest’, particularly in marginal cases. For example, the disputed material in *Spelman and McClaren* could logically have been situated in the alternative ‘interesting to the public’ category because its wider significance or relevance to debate was, itself, eminently debatable. But a similar subjectivity of treatment is arguably present at the core of public interest, as demonstrated in *Ferdinand and Campbell*, both of which permitted limited publication revealing that the public had been misled, albeit about personal and (it could be said) relatively trivial matters. Defensible though these decisions may be, they do not necessarily comfortably correspond with the ‘exceptional’, objective, ‘significant’ terminology with which the public interest category has been depicted.

Within MPI the public interest concept unavoidably entails the compartmentalisation of stories (or fragments of them). But the process of distinguishing categories of information, gauging their wider benefits and assigning them respective values in a given case is unavoidably subjective and thus beset by indeterminacy. As Fish claims,

‘although the category is offered as a way of marking off discourse related to the workings of democracy from discourse of merely personal (and hence regulatable) concern, its own boundaries shift in relation to the success various private groups have in getting their concerns labelled “public” or “private”.’²¹¹

²¹¹ Fish was referring to the US notion of ‘public concern’, but his point is applicable to ‘public interest’: ‘*Fraught With Death*’ (n 64) 1069. Also 1086.

4.2 Conflation or survival? Commercial factors in the balancing exercise

The tenuity of the public interest dichotomy is further demonstrated by a recurring issue facing the courts at balancing stage, namely whether (and how) commercial demands upon the press should be factored into the balancing process. The courts face a dichotomous choice to either include or exclude such pressures, each of which entails specific difficulties. Including commercial factors as relevant is problematic because it involves a confusion of ‘public interest’ and ‘interesting the public’ that Leveson,²¹² a range of judges²¹³ and commentators²¹⁴ have criticised. It entails a conflation because, Part 3.2 established, commercial factors are intrinsically based upon and allied to ‘interesting the public’, which is understood in this context as trivia. Including commercial factors in the Art 8/10 balancing exercise thus indirectly imports traces of ‘interesting the public’, with all the negative implications for privacy that such a conflation brings.²¹⁵

Yet completely excluding commercial factors is also problematic because, according to judicial reasoning outlined earlier, if newspapers in general are no longer commercially viable, their very survival is at stake and with it (by implication) the crucial public interest-watchdog function. A parliamentary select committee report summarised this rationale thus:

‘As gossip in newspapers can help sales and thus enable journalism to continue to perform its essential role in a democracy, it might follow that the commercial viability of the press should be a factor when balancing the public interest in a story against an individual’s right to privacy. If newspapers do not exist they cannot report on issues obviously in the public interest.’²¹⁶

This argument was supported by evidence provided to the committee by the Chartered Institute for Journalists which argued that commercial issues were relevant to the ‘public interest’ ‘because good investigative journalism is expensive and has to be funded some way.’ ... The press therefore relied on revenues from sales and advertising, which required the widest possible circulation.²¹⁷ Yet Leveson questions this line of reasoning which justifies meeting public demand in order to support the press in its crucial watchdog role. He claims this is simply a more subtle version of the argument that ‘whatever sells newspapers must ipso facto be a good thing, since newspapers are a good thing in

²¹² Above at (n 182).

²¹³ ‘The media ... are peculiarly vulnerable to the error of confusing the public interest with their own interest’ Sir John Donaldson MR quoted by Eady J in *Mosley* (n 54) [139].

²¹⁴ Raymond Wacks, *Privacy and Media Freedom* (Oxford: OUP, 2013), 113, 168; Oster (n 140) 68, 75; Wragg (n 80) 199.

²¹⁵ *Privacy and Injunctions* (n 1) [84].

²¹⁶ *ibid* [82].

²¹⁷ *ibid* [83].

themselves'. But both arguments are 'fallacious' because they erroneously assume that because press freedom is good, press choices governed by commercial self-interest are also good.²¹⁸ Other commentators have criticised the lack of evidence supporting this 'economic survival' argument.²¹⁹

In the early case of *Flitcroft* the Court of Appeal included commercial factors in its Art 8/10 reasoning, Lord Woolf CJ stating:

'The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.'²²⁰

According to this rationale, there is a public interest in more newspapers. Interestingly, commercial sales are implicitly presented here in terms of 'interesting the public'. Its reasoning runs: commercial sales are necessary to ensure a higher quantity of newspapers generally, and this is in the public interest. As such, it ties commercial factors concerning the newspaper industry to public interest. However, Lord Woolf's point was later criticised by the Court of Appeal in *McKennitt* as difficult to reconcile with the influential maxim (or 'long-standing view') that what interests the public is not necessarily in the public interest;²²¹ the *Flitcroft* court had failed to distinguish between the two and these aspects of its decision were subsequently discredited.

Yet three recent cases have tentatively returned to considering commercial factors, albeit in more subtle terms than the *Flitcroft* rationale. They were referred to in *Hutcheson* where the Court of Appeal refused to grant an injunction that would prevent publication of the fact that the claimant had a second family. In the leading judgment Gross LJ said:

'for sections of the media, developments in privacy law ... may not only give rise to issues of principle as to freedom of expression ... but also to real commercial concerns – which at least to the extent of the general public interest in having a thriving and vigorous newspaper industry, representing all legitimate opinions, may also be argued to give rise to a relevant factor for the court to take into account.'²²²

²¹⁸ Emphasis added. Leveson Report (n 2) Pt B, Ch 4, [4.9].

²¹⁹ Wacks (n 214) 35; Phillipson (n 140) 233.

²²⁰ (n 52) [11](xii). Emphasis added. Note the similarity between this point and Baroness Hale's statement in *Campbell* above (n 190) though her approach in *Campbell* was different.

²²¹ (n 74) [66].

²²² (n 125) [34]. This public interest in a 'thriving and vigorous newspaper industry' was reiterated in *Weller* (n 137) [75], [175].

Dingemans J echoed this rationale in Weller, referring to ‘the general interest’ in ‘a vigorous and flourishing newspaper industry’.²²³ The proposition that there is a general public interest in having a vigorous and diverse press is slightly more sophisticated than the Flitcroft rationale because it nods to pluralism, a concept that features in other Art 10-related caselaw.²²⁴ But it is, despite appearances, a very similar proposition to Flitcroft. Crucially, both focus on commercial health of the newspaper industry generally and link such issues to public interest arguments that benefit individual newspaper defendants within that industry. The Hutcheson rationale takes a slightly different route as it runs: commercial sales contribute to a greater range of newspapers generally, and this is in public interest. It thus emphasises the qualitative industry-wide benefits (diversity, pluralism) that commercial sales generate, notwithstanding the low quality of the specific defendant newspaper’s disputed story. It suggests that even low quality tabloid expression with a commercial value contributes to a public interest by virtue of its contribution to a diverse newspaper industry. Either way, both the Flitcroft and Hutcheson rationales intrinsically ally commercial health to a newspaper industry in the public interest (either per se, or because of its diversity). In Hutcheson the courts cast commercial factors in prima facie more rights-compatible terms, but it is questionable whether this fully avoids the conflation of public interest/interesting the public that Flitcroft was criticised for.

It should be noted that in Hutcheson, Gross LJ stated only that the public interest in a thriving newspaper industry may be a relevant factor for the court to consider. The extract does not commit to whether this factor will routinely feature in MPI caselaw where most defendants are newspapers. Indeed, Gross LJ’s judgment did not even clearly state whether this was included as a relevant factor in the Hutcheson case itself. Gross LJ’s passage was later quoted by Davies J in *AAA v Associated News*.²²⁵ Here the claimant failed to obtain an injunction prohibiting publication of information that might lead to her identification as the ‘illegitimate’ child of Boris Johnson. The claimant’s case failed partly because public interest issues supported publication.²²⁶ Specifically, the fact that the claimant was Johnson’s second ‘love-child’, suggested a recklessness of character that was ‘relevant [to] both his private and professional character, in particular his fitness for public office’,²²⁷ a finding later upheld by the Court of Appeal.²²⁸ After quoting Gross LJ’s comments regarding the relevance of commercial factors, Davies J stated:

²²³ Weller (n 137) [182].

²²⁴ Terry (n 52) [104]; *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296, [79]-[80], [265]-[266]; *Tugendhat & Christie* (n 63) 12.208.

²²⁵ (n 208) above, [102].

²²⁶ The other reason was that certain actions by the claimant’s mother had reduced her expectation of privacy; *ibid* [115]-[116].

²²⁷ *ibid* [118]-[119].

²²⁸ *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554.

‘further facts may be legitimately included to illustrate points made in a way which captures the attention of readers. The engagement of readers’ interest is important, the commercial imperative to sell newspapers is a relevant factor to be taken into account when conducting the art 8/10 balancing exercise.’²²⁹

Though Davies J was more certain about the relevance of commercial factors to the balancing exercise, the factor still played a peripheral role and its approximate weighting was not articulated. From these authorities it is difficult to ascertain whether commercial pressures have been re-imported into the balancing exercise, or simply ‘added into the scales’ to provide additional general support once the defendant-favoured decision has been reached. But either way, commercial factors are clearly potentially present, and with them traces of ‘interesting the public’.

Public interest and interesting the public: what’s the différence?

The courts’ difficulties in deciding whether to include or exclude commercial factors in the Art 8/10 balancing exercise reflect a certain intermittent mutual reliance of concepts within the public interest binary opposition. MPI caselaw repeatedly stresses that the free press is vital to a functioning democracy. But its public interest-watchdog role is clearly reliant upon its existence, which is in turn is reliant upon maintaining sales. In this sense, public interest is at least partly reliant upon ‘interesting to public’, the noble ideal upon commercial realities. According to MPI discourse ‘interesting to the public’ supplements that which is lacking in the dominant public interest concept; specifically, it reaches out to the public, which it is assumed public interest per se does not or cannot do. In engaging the public it generates essential profit in the market economy – the trivial is (economically) significant and in strict financial terms it dominates the public interest. The very commercial existence of the newspaper industry, including by implication its public interest reportage, is deemed dependent upon interesting the public, which in this context is depicted as trivia and scandal. In turn, the public interest concept has been used as a vehicle for commercial health arguments which are intrinsically allied to ‘interesting the public’. Courts have occasionally acknowledged an additional, alternative public interest in the wider quantitative or qualitative benefits of a commercially healthy newspaper industry.

So despite criticising the media for merging or confusing them, judges too have struggled at times to maintain a clear, coherent distinction between public interest and interesting the public; this arguably represents an instance of the ‘crisis of versus’ Derrida identifies. Like so many other dualisms, ‘public interest’ versus ‘interesting the public’ proves to be a crude distinction, beset by limitations

²²⁹ (n 208) [102].

and contradictions. Particularly problematic is its tendency to simplify the courts' treatment of different modes of expression, leading them to view what are complex qualitative assessments of expression in somewhat reductive terms. The related narratives that cluster around this dichotomy are similarly simplistic and warrant further discussion.

4.3 The shifting 'public' in MPI

The public interest dichotomy does not simply rest upon a fundamental distinction between the innate value of high and low culture.²³⁰ Each concept also entails its own wider model of the public, media and society in which they operate. The account of public interest in Part 3.1 revealed the extent to which it is ultimately premised upon a particular view, a particular set of assumptions about the 'public'. In this category the public is comprised of a highly idealised collection of thoughtful, intelligent citizens, each politically engaged and actively participating in public life and the task of self-government. Such Enlightenment-era ideals are particularly patent in the dominant democratic justifications of Bork and Meiklejohn, but also clearly underpin Mill's work which, according to Barendt, 'assumes ... a lively discussion of rival views, as if society were conducting a perpetual seminar.'²³¹ These notions influence judicial comments regarding the public interest, particularly the democratic debate ground. In contrast, the public that consumes trivia is a small group of juvenile, puerile individuals as opposed to the engaged, debating, public-spirited citizens of 'public interest'. The media correspondingly acts as either interrogative watchdog or cynical, self-interested trash-peddlers according to the category. So, corresponding to each notion in the dualism we see two opposing narratives constructed. 'Public interest' is the privileged narrative, based upon an ideal of how things ought to be, and the other – 'interesting the public' – seems to represent a grubby reality, or how things are. Yet, ironically, this latter narrative also acknowledges the lucrative nature of trivial expression upon which the commercial viability of newspapers apparently depends.

The striking thing that emerges from deconstructing MPI caselaw is that the concept of 'public' across judgments is certainly not consistent, stable or coherent. Instead the sign 'public' represents a series of constructs employed by various parties for their own rhetorical purposes. It is not the aim of this article to put forward an alternative or 'correct' account of the 'public', but to understand how the 'public' is constructed by the various parties who deploy it to advance their own private or institutional agendas in MPI discourse. Adopting the term 'public' bolsters their respective arguments

²³⁰ A distinction which has itself been subject to question; Susan Sontag, *Against Interpretation* (London: Vintage, 2001).

²³¹ Barendt (n 82) 12.

by adding an air of legitimacy; it draws upon cherished democratic aims and values, clearly indicating ‘we, and only we, truly speak for the public’.

Numerous ‘publics’ of fluctuating sizes and natures crop up in different contexts in MPI discourse. First, there is the ‘public’ used by the media in its self-justifying rhetoric. This public is essentially the market of consumers who will only buy what interests them and whose demands must be met if papers are to survive – the very existence of the press depends on it. In this narrative, the consumers are empowered, in charge, and papers are merely giving them what they want; doing so is essential to their watchdog function. Though as Fiss notes, ‘To be a consumer, even a sovereign one, is not to be a citizen.’²³² Second, is the more subtle depiction of ‘public’ in the justifications for free expression that underpin this area. It is clear that the dominant justifications concerning democratic debate and truth rest upon Enlightenment-era ideals where the ‘public’ is a monolithic entity comprised of a homogenous group of politically engaged, intelligent citizens, always keen to debate serious social issues. These members of the public reflect the contradictory co-existence of noble ideals and elitist assumptions. And finally, despite their claims, judges are no more immune than others to this tendency to co-opt the ‘public’ for their own rhetorical purposes. Whilst critical of the media for self-interestedly conflating public interest and interesting the public, other judicial comments betray certain preconceptions of their own regarding the public. Their evident (and justifiable) distaste for much of the reportage in MPI disputes on occasion tilts over into a caricature of the ‘public’ (or ‘a public’) that consumes it. This public is implicitly characterised as a voyeuristic, licentious mob, ironically echoing the Greek origins of the word ‘democracy’ which meant rule of the people (‘demos’), but with connotations of the unruly multitude. This arguably gives the impression of a well-intentioned paternalist elite reinforcing certain stereotypes about the public (and what ‘interests’ it) whilst drawing upon specific Enlightenment-era liberal ideals of what is truly for the public’s own good. This is evidenced by judicial use of the Profumo example which is underpinned by the somewhat patronising assumption that though the public has a general right to information regarding serious, weighty political matters, it will not be interested unless a little titillation also features.

Perry warns that judicial moral-political orthodoxies could be hidden within value assessments of expression.²³³ And whilst firmly supportive of stronger press regulation, even Wacks concedes that the public interest concept is problematic in that ‘It casts as moral guardians those charged with assessing the merits of publication’ and therefore cannot be objective.²³⁴ The evidence from caselaw suggests that such concerns are not misplaced. Across the above examples, the ‘public’ is characterised in contradictory, disparate terms, sometimes idealised, sometimes denigrated. It is

²³² Owen M Fiss, ‘Why the State?’ (1987) 100 Harvard Law Review 781, 788.

²³³ Perry (n 102) 1174.

²³⁴ Wacks (n 214) 251.

subjected to shifting depictions for rhetorical effect, marshalled to and fro to serve rhetorical ends. In this way, both oppositions in the dichotomy entail certain assumptions about the public. Yet crucially we are, each of us, both none and all of these ‘publics’.

These observations bring to mind Lord Leveson’s discussion of the press and the public interest. His report explained that public interest (and freedom of expression) are ‘powerful and important concepts’ that must be used with ‘clarity and care’:

‘They are concepts which are capable of being, and have been, used both rhetorically and analytically to explain and support a range of perspectives, arguments and conclusions.’²³⁵

The implication of this statement, borne out over the course of his subsequent investigation, is that press use of the term ‘public interest’ is self-justifying rhetoric, in contrast to the ‘proper’ ‘analytical’ understanding of the kind preferred by judges and Leveson. Yet this deconstructive analysis suggests that a concept such as ‘public interest’ is laden with ideological assumptions and is thus inherently and unavoidably rhetorical, even when deployed ‘analytically’. In Fish’s terms, ‘it is ideology (and politics) all the way down’.²³⁶ Judges in particular could perhaps be more attuned to the innate limitations of this central concept in MPI discourse.

Deconstruction’s natural ‘alliance with underdog’, which in this binary opposition is ‘interesting the public’, might ultimately and problematically have led to a preferencing of the Goliath media corporations in these cases. But this potential paradox of applying deconstruction to the Art 8/10 balancing exercise does not arise because a different marginalised ‘other’ has emerged; the ‘public’. Though it plays a central role in MPI caselaw, in every other respect the ‘public’ is marginalised in this reasoning. For example, the disputes themselves primarily arise between different sections of a wealthy elite, namely high-profile public figures and the press.²³⁷ Furthermore, caselaw stresses that judges must determine the public interest, whilst editors decide what interests the public, begging the question: what is left for the public to decide? In short, MPI litigation takes place between elites, and is arbitrated by a legal elite according to concepts which call upon the ‘public’, but in which the ‘public’ seem to have little, if any, stake.²³⁸ Ultimately, the notion of public interest does not live up

²³⁵ Leveson Report (n 2) Pt B, Ch 1, [1.4].

²³⁶ *Fraught With Death* (n 64) 1070.

²³⁷ It should be noted that though the claimants in most MPI cases are high profile and/or wealthy individuals, a minority of actions are not brought by such individuals. See eg: *AMP v Persons Unknown* [2011] EWHC 3454.

²³⁸ However, the action’s broader significance may lie in its potential to provide a degree of protection in the modern hi-tech panoptical world to the wider ‘public’ its reasoning is based upon: *Hall & Others v Google Inc* [2014] EWHC 13.

to the ideals its rhetoric extols. This marginalisation of the ‘public’ is ironic in light of the claimed democratic justifications that underpin this area.²³⁹ MPI caselaw has faced arguably unjustifiable accusations that privacy protection is being expanded at the whim of unaccountable, undemocratic judges.²⁴⁰ Reliance on the one-dimensional depictions inherent in this binary opposition does not dispel such accusations. Such language, and the mind-set it reflects, should be reconsidered if people are to feel that they (we) have a stake in human rights discourse.

Conclusion

Deconstruction’s tendency towards the equivocal does not lend itself to convenient, concrete conclusions or recommendations for practical reform. Instead, as this article has shown, ‘the conclusions deconstructive readings reach are frequently claims about structures of language, operations of rhetoric, and convolutions of thought’.²⁴¹ Deconstructing MPI caselaw has revealed various insights of this nature.

The HRA Art 8/10 framework, primarily composed of floating signifiers, effectively defers conflict to an abstract-level, judge-made binary opposition based around the concept of ‘public interest’. At this stage the operation and influence of hierarchy in the balancing exercise becomes apparent. The preferencing of ‘public interest’ over ‘interesting the public’ is informed by a cluster of ideals, tropes and narrative constructs based around a civic-minded, politically-engaged citizenry reading the serious, objective reportage of a progressive, interrogative press that protects and serves it. The ‘public interest’ category and what it represents is distinguished from, and privileged over, ‘interesting the public’. This in turn is rudimentarily characterised as frivolous, salacious content that provides mere entertainment for the prying, prurient, even indolent and thoughtless. Whatever the virtues of MPI doctrine, it is difficult not to conclude that a residue of culturally-specific assumptions is sedimented within this crucial concept

It seems that the issues surrounding media privacy disputes are more complex and nuanced than the balancing exercise and its key binary opposition are able to represent. Most significantly, they are simply unable to directly confront a host of difficulties concerning the role of commercial factors in

²³⁹ Schauer previously expressed similar concerns regarding US free speech laws, claiming paternalist restrictions should not be dressed up in democratic rhetoric: Frederick Schauer, ‘The Role of the People in First Amendment Theory’ (1986) 74 California Law Review 761, 786-787.

²⁴⁰ Paul Dacre, Editor-in-Chief of Associated News, quoted in Privacy and Injunctions (n 1) [33].

²⁴¹ Culler (n 15) 221.

such decisions. For example, how to accommodate tensions between culturally specific Enlightenment ideals of civic participation, debate etc. and modern commercial imperatives that simultaneously support and obstruct the press in furthering these values. Or the derivative question of whether the press simply meets public ‘demand’ for trivia, or plays a more complex role in also stimulating that ‘demand’.²⁴² In short, how to contend with the core contradiction of ensuring the very survival of newspapers (or rather, their watchdog function) in a capitalist economy, whilst curbing their freedom to publish the intrusive, low-quality but high-value content that they claim is essential for this survival. These questions are arguably situated beyond the self-imposed boundaries of adjudication. Yet they feed into legal argument founded on the ‘public interest’ dichotomy. And they demonstrate that this dualism is a crude instrument which struggles under the burden of such issues. A clear distinction between ‘public interest’/‘interesting the public’ cannot always be maintained. Instead, doctrine fluctuates between the two poles, privileging public interest expression whilst stressing the importance of maintaining press readership in harsh commercial climates. In doing so it supports Culler’s claim that ‘legal doctrine and argument are attempts to paper over contradictions, which nonetheless reassert themselves.’²⁴³

²⁴² This broader issue is very briefly touched upon in the Leveson Report, (n 2); Pt B, Ch 2, [5.7]; Ch 4, [4.10].

²⁴³ Culler (n 15) Preface to 25th Anniversary Edition.